IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 1/1997 AND CROSS OBJECTIONS NO. 3/1997.

Second Appeal No. 1/1997.

Shri Parashuram Panchaigham
Prasanna of Poinguinim,
Canacona, Goa, represented
by its special attorney
Shri Vassudev Venkatesh Dessai. .... Appellant/
Original Plaintiff.

Versus

1. Shri Naguesh Raia Naik
(since deceased), by his
legal heirs.:-
1a) Smt. Sheela Naguesh Naik,
widow.
1b) Shri Amar Naguesh Naik,
major, son of deceased.
1c) Shri Jairaj Naguesh Naik,
major, son of deceased.
1d) Shri Manoj Naguesh Naik,
major, son of deceased.
1e) Shri Deepak Naguesh Naik,
major, son of deceased.
1f) Kum. Meghana Naguesh Naik,
major, daughter of deceased.
1g) Kum. Sadhana Naguesh Naik
major, daughter of deceased.
2. Smt. Maguesh Naik,
wife of Nagues Naik,
all residents of Poinguinim,
Canacona, Goa. .... Respondents/
Original Defendants.

Shri V.P. Thali, Advocate for the Appellant.

Shri A.V. Nigalye, Advocate for the Respondent No.1(e).

Shri D. Pangam, Advocate for the Respondent No. 1(d).

Cross Objections No. 3/1997.

Shri Deepak Naguesh Naik,
resident of House No. 879,
Velwaddo, Poinguini,
Canacona, Goa. .... Cross Objector.

Versus

Shri Parashuram Ranchaigram
Prasanna of Poinguinim,
Canacona, Goa, represented
by its special attorney
Shri Vassudev Venkatesh Dessai. .... Opponent.

Shri A.V. Nigalye, Advocate for the Cross Objector.

Shri V.P. Thali, Advocate for the Opponent.

CORAM: N. A. BRITTO, J.

DATE: 31st MARCH, 2005.

ORAL JUDGMENT:

This is plaintiff's second appeal arising from R.C.S. No. 120/81.

2. The dispute between both the parties is regarding the property admeasuring about 6225 sq. metres and surveyed under No.85/1 as “Shristhal” of Poinguinim village in Canacona Taluka, lying between two roads connecting Margao-Karwar road (National Highway).

3. The case of the plaintiff is that the said property is named “Aloyacodial Ticana” or “Aloiacodial or Devalayacodial” and the same is situated at Velvado of Poinguinim and is enrolled under Matriz No.242 and bounded on the east by water drain, on the west by Vergal of Vishwanath Ganaxama Boto and a public street which separates Telamola of Comunidade of Poinguinim and on the south by Tollem of Anta Pandurang Boto and others and the same is also enrolled in the Inventory of the plaintiff completed in or about 1930 under Nos.21, 22 and 24. The case of the plaintiff was that the land was lying in continuous and peaceful possession of the plaintiff and therefore the plaintiff is entitled to claim prescriptive title to the same.

4. On the other hand, it was the case of the defendants, that they are the owners of the property known as “Ramfolalem” or “Vencotexa Naraina Folagoracodil” which was purchased by the mother of the defendant No.1 in the year 1930 by sale deed dated 2.8.1930, having Land Registration Nos.3018 and 3019 and Matriz Nos. 385 and 388 and surveyed under Nos. 92/1, 92/2, 92/4, 92/7 and 85/1. The defendants stated that survey No.85/1 which is a part of the defendants' property was wrongly surveyed in the name of the plaintiff and appropriate proceedings to correct the Index of Land was filed before the Deputy Collector and that the said survey No.85/1 was not promulgated.

5. The learned Trial Court by its Judgment/Decree dated 10.6.1994 decreed the suit of the plaintiff and dismissed the counter claim filed by the defendants. The learned Trial Court was much influenced by the fact that in the initial survey ,namely Form no.III, the name of the plaintiff was recorded, inspite of the fact that the defendants on or about 14.2.1977 had raised a dispute regarding the said entry in the name of the plaintiff in the said Form No.III. It is common ground that the objections taken by the defendant were decided on 24.11.87 by the A.K., Record of Rights, against the defendants and appeal filed against the said Order was dismissed by the Deputy Collector. By another Order dated 22.7.04 of the Addl. Collector, Margao the appeal filed by the defendants has been allowed and the Order of the Deputy Collector dated 10.6.96 has been set aside and the A.K. has been directed to re-hear the said objections. This Judgment of the learned Addl. Collector has been produced by the defendants by application dated 2.9.04 before this Court and since it is a subsequent document which has come into existence after the filing of the present appeal, I see no reason why leave should not be granted to the defendants to produce the same. As regards the other document filed with the said application dated 2.9.04, the defendants did not press for the production of the same, namely the Judgment in L.A.C. No.88/91 of the learned Addl. District Judge, Margao

pertaining to Survey No.92/3.

6. The learned Trial Court also appears to have come to the conclusion that the defendants could not have been in possession of the suit property surveyed under No.85/1 because defendant No.1 was serving in Bombay upto the year 1985 or thereabout, forgetting the fact that the family of the defendant No.1 was residing in the locality. Indeed, it was the very case pleaded by the plaintiff that on or about 31.3.1979 the defendant No.1 along with defendant No.2 and his sons had entered the suit property for the first time under the pretext of collecting fruits. It was also the case of the plaintiff that after the first suit filed by the plaintiff was dismissed by Order dated 18.10.1980 for want of permission required under Article 7 of the " Regulamento das Mazanias" the defendants had taken liberty to interfere with the suit property. The defendant No.1 was pursuing his survey objections from 1977. The present suit was filed only on 24.3.81. The approach of the learned trial Court was erroneous.

7. The learned Addl. District Judge, Margao in R.C.A. No. 63/94, by his Judgment/Order dated 15.7.1995 set aside the Judgment/Decree of the Trial Court dated 10.6.1994 insofar as it had decreed the suit of the plaintiff, and dismissed the said suit.

8. In reversing the Judgment of the Trial Court and dismissing the suit filed by the plaintiff, the learned first Appellate Court observed that in the absence of evidence on the part of the plaintiff to substantiate their claim as against either the property in its entirety of Survey No.85/1 or the portion in dispute, (in fact portion in dispute is S.No.85/1) the plaintiff could not be declared to be the owner of the suit property. The conclusion arrived at by the learned Addl. District Judge could not be faulted. It was the case of the plaintiff that it is the disputed property/suit property surveyed under No.85/1 that was known as " Aloyacodial Ticana or Aloiacodial or Devalayacodial ". It was not their case that the disputed property was surveyed under S.No.85/1 and 85/2. However, in the course of evidence it has come on record that the plaintiff also has a property which is adjoining Survey No.85/1 and it is surveyed under No.85/2 in which the temple of the plaintiff and other buildings are situated. Although the plaintiff stated that the said property was recorded in their Inventory under Nos.21, 22 and 24 from the year 1930, the plaintiff chose not to produce any record of the same. The plaintiff also chose not to produce any title document and the plaintiff remained satisfied by producing the Matriz/Land Revenue Certificate under No.272. A bare perusal of this very Matriz certificate shows that none of the boundaries mentioned therein refer to S.No.85/1. The

boundaries probably refer to Survey No.85/2 with a road on the western side as well as on the northern side, and, these are the two boundaries of the plaintiff's property surveyed under S.No. 85/2. The plaintiff, on the basis of the said Matriz certificate, could not have claimed survey No.85/1 as their property or as part of the plaintiff's property also surveyed under No.85/2. The plaintiff therefore was certainly not entitled to be declared as the owner of the disputed property surveyed under No.85/1 as sought to be done by the learned Trial Court. Form No.III and Matriz certificate moreover are not title documents.

9. This Second Appeal was initially admitted on the following substantial questions of law :-

> " 1. Whether the appellate Court misread oral evidence of P.W.1 and did not appreciate the survey plan on record in its correct perspective ?
>
> 2. Whether the appellate Court reversed the decree passed by the trial Court without considering the findings and reasoning given by the trial Court in support of the same ? "

The plaintiff on 25.2.05 has filed an application under S.100(5) C.P.C. raising another substantial question :-

3. Whether the First Appellate Court committed a material error of procedure in deciding the appeal without formulating the points for determination as otherwise required under O.41, Rule 3A C.P.C. ?

10. Shri Thali, the learned counsel of the appellant/plaintiff has submitted that the learned first Appellate Court did not at all frame points for determination in deciding the first appeal and also did not assign any reason as to why he was not agreeing to the reasons assigned by the Trial Court and these did raise substantial questions of law. Shri Thali has placed reliance on the decisions in the cases of ***Vishwas Balu and others v. Ghasiram Ramratan Jajum and others (A.I.R. 1975 Bombay 278), Smt. Anita M. Barretto v. Abdul Wahid Sanaullah (A.I.R. 1985 Bombay 98) and Subhash Vithalrao Gatlewar and others v. Dattatraya Keshavrao Shinde (2005 (1) Mh.L.J. 43).***

11. In the case of Smt. Anita Barretto (supra) this Court observed that the provisions of O.41 R.31(a) require the appellate Court to state in its judgment the points that arise for determination after the arguments are advanced. This Court referred to the case of Mhasu v. Davalat (1905) 7 Bom. LR. 174 dealing with similar provisions in the earlier Civil

Procedure Code and stated that the object of the Legislature in making it incumbent on an appellate Court to raise points for determination was to clear up the pleadings and focus the attention of the Court and of the parties on the specific and rival contentions of the latter. The points which must arise for determination by a court of first appeal must cover all important questions involved in the case and they should not be general and vague. It is a matter of almost textbook knowledge that the exact questions which arise in the appeal and require determination must be stated in the judgment. This Court also observed that the learned Judges of the Courts of first appeal should not approach the appeals merely from the point of speedily disposing of the same and the appeals must be also intelligently disposed of after taking note of the arguments advanced, the points arising from the arguments and other material and then deciding those points properly. This Court took note of the fact that a failure to understand the object of the provision such as O.41, R.31(a) of the Code has demonstrably resulted in the instant case in the failure of justice at the hands of the lower appellate Court.

12. In the case of Subhash Vithalrao Gatlewar (supra) this Court made an observation which reads as follows :-

" True it is that in view of the

> precedents relied upon by learned Advocate Shri Chandurkar failure to observe Rule 31, Order 41 would certainly constitute a substantial question of law consequence of which shall be that a second appeal can be admitted for final hearing. ”

13. On the other hand, Shri A.V. Nigalye, the learned counsel for the respondent No.1, has seriously disputed that the questions raised are substantial questions of law and has referred to the case of ***Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and others [(1999) 3 S.C.C. 722]*** wherein the Hon'ble Supreme Court has stated that :-

> “ It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of

> circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence. "

14. It is certainly open to the respondents in terms of sub-section (5) of S.100 C.P.C. to say that the questions framed are not substantial questions of law arising for the determination of the High Court. What is a substantial question of law in a given case is a matter which has been decided in various pronouncements of the Supreme Court. Right now reference could be made to the case of ***Santosh Hazari v. Purushottam Tiwari (dead) by Lrs. (A.I.R. 2001 S.C. 965)*** wherein the Supreme Court speaking through three learned Judges, has stated that a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial', a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of

the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by Court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter.

15. To my mind the questions framed or sought to be framed in this second appeal do not meet the said test laid down by the Hon'ble Supreme Court and therefore cannot be termed as substantial questions of law arising in the second appeal between the parties. In my view, in the light of what has been stated by the Supreme Court a material error of procedure in deciding an appeal, as required under O.41, Rule 3A, cannot amount to substantial question of law.

16. The learned Addl. District Judge has, in terms, not given a finding as to who was in possession of the suit property surveyed under No.85/1 at the time of the filing of the suit and as per the defendants themselves, they were dispossessed of the suit property after they were injuncted by the trial Court. However, the learned Addl. District Judge has

disbelieved all the four witnesses examined on behalf of the plaintiff in support of the plaintiff's case for ownership of the said property as well as its possession. As far as the ownership is concerned, I have already stated that the conclusion arrived at by the learned Addl. District Judge could not be faulted. The learned Addl. District Judge has rightly observed that the learned Trial Judge ought to have demanded the best evidence from the plaintiff instead of adjudicating their claim on the basis of the sketchy and questionable evidence sans any technical knowhow bearing on the very important aspect of their title to the property. The learned Addl. District Judge had also observed that the plaintiff had examined only interested witnesses, all and singular. Indeed each of them were not only mahajans of the plaintiff-temple but at one time or the other, they had occupied different positions in the committee of the said temple. Two of them had stated that nobody had obstructed the possession or enjoyment of survey No.85/1 while two of them had stated that the defendants were interfering with Survey No.85/1. Although the plaintiff had pleaded that in the year 1970 they had cut a number of trees with sanction from the Forest Department, the plaintiff did not produce any such document in support of their claim for possession. Although the plaintiff pleaded that lease was granted to the Pujari of the Devasthan by name Naguesh Sadashiv Bhat Tengse from 1972 – 75, the plaintiff had not examined any independent witness to

support the said claim, and, although it was stated that the said Tengse had expired and his son had become the new Pujari, the plaintiff chose not to examine him. The plaintiff as an institution would certainly have records of payment made towards the lease given to the said Pujari, but the plaintiff produced no such record which certainly would have advanced their case of possession. Plaintiff's witnesses had admitted that record was being maintained of auction transactions but had chosen not to produce any. The letter dated 5.3.92 (Exh.PW1/H) shows that on account of objection taken by the defendants, permission earlier granted was kept in abeyance, but nevertheless the trees were cut, as can be seen from the letter dated 23.6.92 (Exh.PW1/H Colly). When this matter was brought to the notice of P.W.1 Vassudev Dessai, he admitted that some trees were cut in survey No.85/1 and they were still lying there. However, he feigned ignorance and stated that he did not know whether the felled trees were seized by the Forest Department and further stated that he also did not inquire as to why the said felled trees were still lying in the said portion. This comes from the plaintiff's star witness who claims to be the special attorney of the plaintiff. If P.W.1 Vassudev did not know the background of the said felling of trees, his evidence as regards possession of the suit property by the plaintiff could not be accepted. P.W.2 Kashinath does not even know whether it is the defendants who restrained the plaintiff from transporting the trees which

were cut from survey no.85/1. In my view the evidence of the plaintiff's witnesses as regards both ownership and possession of the suit property, was rightly rejected by the first appellate court.

17. Shri Nigalye, the learned Advocate of the Respondent No.1(e), has submitted that he does not wish to press for the Cross Objections. Consequently the same are hereby dismissed.

18. Lastly Shri Nigalye has submitted that the suit of the plaintiff was not maintainable for want of permission taken from the Administrative Tribunal in terms of Article 7 of the Devasthan Regulations (Diploma Legislativo No. 615 dated 30.3.1933 and amended by Diploma Legislativo No.1898 dated 29.5.1959). When translated the said Article reads as follows :-

> "Art. 7 – The institution of law suits, the transaction, confession or desistence from the request, before the courts of justice shall require the authorization of the Administrative, Fiscal & Audit

Tribunal ”.

19. On the other hand, Shri Thali has referred to Article 184 of the said Devasthan Regulation which, when translated, reads as follows :-

> “ Art.184 – The permission for conservative actions shall be obtained through the application with grounds, addressed by the attorney of the body of members (mazania) to the Administrator. ”

20. The submission relating to Art.7 of the Devasthan Regulations has been made by Shri Nigalye for the first time at the hearing of the second appeal. No reference was made to it either before the two Courts below or in the Cross-Objections. In the light of the conclusions I have arrived, it is not necessary to go into the said submission.

21. In view of the above, the second appeal is hereby dismissed, leaving the parties to bear their own costs.

22. Shri Thali, learned Advocate of the Plaintiff-Appellant, prays that the injunction granted by the Trial Court and continued with the Order of

this Court, be continued for a period of eight weeks. In view of this prayer, operation of this Judgment/Order shall be stayed for a period of eight weeks.

N. A. BRITTO, J.

sl.